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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 44

R. K. PROCUNIER,
Director of the California Department of Corrections
Petitioner,

vs.

VERON ATCHLEY,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 642

R. K. PROCUNIER,
Director of the California Department of Corrections
Petitioner,

vs.

VERON ATCHLEY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

1. Was respondent Veron Atchley's confession involuntary as a matter of law?

2. Was the District Court correct in deciding that the trial court hearing on the involuntary confession was constitutionally inadequate?

3. Was the District Court correct in deciding that respondent Veron Atchley had rebutted the presumption of 28 U.S.C. § 2254(d)?

4. Will federal courts continue to examine the constitutionality of trial court convictions in compliance with principles defined by this Supreme Court?

5. Was the District Court correct in deciding that any further hearing on respondent's involuntary confession be provided by the State under the procedures defined by this Supreme Court in *Jackson v. Denno*?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondent Veron Atchley's confession was involuntary, in violation of Section 1 of Amendment XIV of the Constitution of the United States, which provides in relevant part as follows:

> "nor shall any State deprive any person of life, liberty or property, without due process of law . . ."

The trial court hearing on respondent's involuntary confession was also in violation of that section of Amendment XIV.

The State's argument is based in part on 28 U.S.C. § 2254(d), which is set forth in full in the appendix to this brief. That subsection must be considered in the context of Chapter 153, "Habeas Corpus," of Title 28 of the United States Code.

STATEMENT OF THE CASE

Atchley's Involuntary Confession

Respondent Veron Atchley[1] is of low natural intelligence, with an Intelligence Quotient of 60.[2] He also suffers from damage to his brain and central nervous system from a

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[1]Through the transcript, Atchley is often referred to by his nickname "Jack."

[2]Single Appendix 20. That appendix is hereafter cited as "A".

blow received approximately two years before his trial.[3] Atchley was raised in the mountain country of Tennessee, of a farm family of twelve children.[4] Going to school for only three or four months a year, he managed to complete the third grade.[5] He cannot read or write anything except his own name. All papers have to be read to him.[6]

Atchley was arrested for the murder of his wife. While under arrest by the police, he was kept occupied and isolated.[7] He was forty-eight hours without sleep.[8] He wanted to sleep, but he was either prevented from sleeping[9] or the jail was such that he could not sleep.[10] He was in the highest state of shock.[11]

He requested an attorney eight or ten times,[12] but was not allowed to see an attorney until after his confession. He was not advised of his legal rights.

Atchley was visited in jail by Mr. Roy J. Travers.[13] Mr. Travers was his friend and his insurance agent. But Travers had also been a deputy sheriff for three and a half years, investigating homicides for two years.[14] Atchley and Travers discussed the life insurance on Atchley's deceased wife.[15]

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[3]A. 20.

[4]A. 180-1.

[5]A. 186.

[6]A. 48, 186-7.

[7]A. 104.

[8]A. 197, 189.

[9]A. 206.

[10]A. 198-9.

[11]A. 196-7

[12]A. 154-5, 189-90, 206.

[13]A. 141 et seq.

[14]A. 172-3.

[15]A. 143, 149-51.

Atchley was concerned about their children receiving the insurance proceeds, and Travers indicated he needed facts from Atchley for purposes of that insurance.[16]

After leaving Atchley, Travers was asked by a deputy sheriff to return for another interview with Atchley. The deputy wanted the second interview to be secretly recorded.[17] At the request of the officer, Travers returned for the second interview to make the secret recording. This time Travers took the initiative and asked Atchley questions, not just about the insurance but also about the shooting.[18] In his questioning of Atchley, Travers used the same interrogation techniques as when he was a deputy sheriff working on homicides.[19] Travers led Atchley to believe that he needed the information for the insurance.[20] Atchley was the primary or final beneficiary under the policy,[21] and the subject of the insurance was mentioned approximately nine times during the recorded interview.[22] Travers told Atchley that he would not write anything down.[23] Atchley knew nothing of the recording being made and believed that his interview with Travers was private and confidential.[24] Under this questioning by Travers, Atchley made many statements regarding the death of his wife.[25]

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[16]A. 142-3, 148, 149-51, 159.

[17]A. 155-6, 163-4.

[18]A. 172-4.

[19]A. 172-4.

[20]A. 95, 96, 98, 100, 105.

[21]A. 144, 159.

[22]A. 95, 96, 98, 100, 102, 103, 104, 105.

[23]A. 97.

[24]A. 89, 146, 156-7.

[25]A. 95-105.

State Court Conviction

During Atchley's trial, the tape recording was offered in evidence.[26] Atchley objected that it was an involuntary confession.[27] But the recording was admitted into evidence and played to the jury.[28] The recording was also used extensively to impeach Atchley's testimony.[29] Atchley was convicted. And again the recording was introduced against him, this time in the hearing on his sentence.[30] Atchley was sentenced to death.

Federal Court Proceedings

After exhausting his other available remedies,[31] Atchley filed a petition for habeas corpus in the District Court.[32] After pleadings and hearings, the District Court held that the trial court proceedings were unconstitutional.[33] The District Court said:

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[26] A. 86-87, 160.

[27] A. 86-160. The hearing on the confession is discussed on pp. 18-30 of this brief.

[28] A. 160.

[29] A. 199-205. Reporter's Transcript 1638, 1670-83, 1725-6, 1757-8. The Reporter's Transcript has been lodged with the Court, and is hereafter cited "R.T."

[30] A. 207-8.

[31] Appeal to the California Supreme Court, *People v. Atchley*, 53 Cal.2d 160, 346 P.2d 764 (1959); petition for certiorari to the United States Supreme Court, *Atchley v. California*, 366 U.S. 207 (1961); denial of habeas corpus, *Atchley v. Dickson*, 338 F.2d 1014 (9th Cir. 1964); reduction of his death sentence to life imprisonment, A. 19-22; and habeas corpus in the state courts, A. 69.

[32] A. 7 et seq.

[33] A. 68-79.

> ". . . it is the conclusion of this Court that the trial court did not reliably determine whether Atchley's confession was voluntary or involuntary."[34]

The District Court directed the State to provide either a new hearing on voluntariness or a new trial, or Atchley would be entitled to his release.[35]

The State appealed. The United States Court of Appeals affirmed the judgment of the District Court.[36] The State then petitioned this Court for a writ of certiorari.

SUMMARY OF ARGUMENT

Atchley is an illiterate man with low natural intelligence and permanent brain damage. The police extracted a confession of murder from him.

The confession was vital to Atchley's conviction and sentence to death. The confession was his first statement to the police that he had brought the gun to the scene of the shooting, had waited for his wife to arrive, and had intended to scare her. The playing of the confession to the jury was vital evidence to the jury's finding of guilt. It was not only important to Atchley's guilt or innocence, but also to the degree of guilt under the numerous theories submitted to the jury. The confession was used against him several times, and the trial and confession resulted in his conviction for murder and his sentence to death.

The confession was involuntary as a matter of law. When the confession was obtained, Atchley had been denied an attorney several times. He had not been advised of his legal rights. He had not slept for forty-eight hours and was in a state of shock. The confession was then

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[34] A. 76.

[35] A. 78-9.

[36] A. 80-85.

extracted by the deceit of a friend: Atchley was tricked into discussing the death with his friend, an insurance agent, by the deceit that the information was needed to obtain insurance money for Atchley's children. During that private discussion, the confession was secretly recorded.

The trial court hearing on Atchley's involuntary confession was also constitutionally inadequate. The trial judge did not decide whether the confession was voluntary or involuntary. The hearing was conducted in the presence of the jury. And relevant evidence on the involuntary confession was excluded by the trial judge.

The State's arguments to this Court present no basis for reversal of the judgments of the District and Circuit Courts:

The State contends that the District Court *refused* to apply the presumption of 28 U.S.C. § 2254(d). The District Court did not refuse to apply the presumption. The court expressly found that the presumption had been rebutted. The court was correct. And further, Atchley's confession was within the exceptions to the presumption.

The State's principal objective is reversal of this Court's numerous decisions that federal courts should examine the constitutionality of trial court convictions. The State wants the protections provided by the federal courts virtually eliminated. This Court cannot accept the State's objective without abdicating its constitutional duties to fifty separate, geographically diverse, and procedurally diverse state court systems. This Court's prior decisions on federal courts examining the constitutionality of trial court convictions are correct and should be affirmed.

The State finally argues that if a hearing is to be held on the involuntariness of Atchley's confession, he should petition the State for that hearing. But the procedures defined by this Court in *Jackson v. Denno*, 378 U.S. 368, 12 L. Ed. 2d 908, 84 S.Ct. 1774 (1964), direct the State to provide the necessary hearing.

* * *

On behalf of Atchley, we contend that the judgments of the District Court and Court of Appeals should be modified to provide that (1) Atchley's confession was involuntary as a matter of law, and (2) he should have a new trial; and as so modified, those judgments should be affirmed. At the very least, the judgments of the courts below granting Atchley a new hearing on the involuntariness of his confession should be affirmed in their present form.

ARGUMENT

Atchley's Confession Was Vital to His Conviction and Sentence to Death

In the days after his arrest, Atchley told several versions of the death of his wife: (1) He first denied knowledge of her death, a denial he twice made to the police.[37] (2) Later, Atchley admitted being at the scene, but said that his wife had brought the gun and that she had been killed in a struggle.[38] (3) In the recorded statement, Atchley said that he had brought the gun to the scene, that he had waited for his wife to arrive, that he had intended to scare her, and that several shots had been fired while the gun was in his hand.[39] That recorded confession was vital to Atchley's conviction and sentence to death.

It was vital to the police investigation and prosecution. It was the first time the police heard Atchley say that he had brought the gun to the scene of the shooting, had waited for his wife to arrive, and had intended to scare her. Its importance to the police and prosecution is evident from the fact that the recording was made and used extensively during the trial.

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[37]R.T. 836-9, 759-65.

[38]R.T. 775-8.

[39]A. 95-105.

It was even more vital to the jury. The playing of the recording was the first time the jury heard that Atchley had gone to the scene to scare his wife. This was important to whether the jury believed Atchley's basic defense that her death resulted from an accidental struggle. The California Supreme Court expressed its agreement that "it was critical whether the jury believed [Atchley's] story of a struggle for the gun."[40] Its significance to the jury was further enhanced by the numerous times the State used it to impeach Atchley's testimony.[41]

Not only was the confession vital to Atchley's guilt or innocence, it was pivotal to the *degree* of guilt. The case was tried and submitted to the jury on several theories: deliberate and premeditated murder, murder by lying in wait, second degree murder, manslaughter, justifiable homicide, and self defense.[42] Atchley's recorded statements of bringing the gun to the scene, waiting for his wife, and intending to scare her were vital to these degrees of guilt. The jury apparently attached great weight to the confession, since it found Atchley guilty of murder in the first degree and imposed the death penalty.

The State's brief makes extensive reference to the different versions of the death which Atchley told.[43] But the important point is that there *were* differences between the confession and his prior statements to the police. And that confession was vital to the police and prosecution in obtaining his conviction and death sentence.

The State then attempts to support the recorded confession by referring to other statements which might corroborate it.[44] There are several answers to the State's attempt.

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[40]A. 66.

[41]See footnote 29.

[42]Clerk's Transcript 126 et seq. The Clerk's Transcript has been lodged with the Court, and is hereafter cited "C.T."

[43]Petitioner's Brief, pp. 4-9.

[44]Petitioner's Brief, 9-10.

First, there were material differences in the statements. For example, in one statement cited by the State (p. 9), Atchley did not admit going to the scene for the purpose of scaring his wife.[45] Second, the allegedly corroborating statements were not made until *after* the recorded confession had been made and the police knew about it.[46] And Atchley did not testify at the trial until *after* the confession had been played to the jury. To both the police and the jury, the confession was a vital link in the chain of conviction. Third, the State's attempt to corroborate the confession is contrary to numerous decisions of this Court. This Court has held that if an involuntary confession is used, there is a violation of due process which requires reversal—even if there were other confessions and other evidence sufficient to prove guilt. For example: In *Greenwald v. Wisconsin*, 390 U.S. 519, 20 L. Ed. 2d 77, 88 S.Ct. 1152 (1968), there was a series of admissions; in *Darwin v. Connecticut*, 391 U.S. 346, 20 L. Ed. 2d 630, 88 S.Ct. 1488 (1968), there was a series of confessions; in *Haynes v. Washington*, 373 U.S. 503, 10 L. Ed. 2d 513, 83 S.Ct. 1336 (1963), there was "substantial independent evidence tending to demonstrate guilt"; in *Spano v. New York*, 360 U.S. 315, 3 L. Ed. 2d 1265, 79 S.Ct. 1202 (1959), there was "sufficient other evidence in the record"; in *Gallegos v. Colorado*, 370 U.S. 49, 8 L. Ed. 2d 325, 82 S.Ct. 1209 (1962), the "basic ingredients of the confession came tumbling out as soon as he was arrested"; in *Leyra v. Denno*, 347 U.S. 556, 98 L. Ed. 948, 74 S.Ct. 716 (1954), there were subsequent confessions; in *Culombe v. Connecticut*, 367 U.S. 568, 6 L. Ed. 2d 1037, 81 S.Ct. 1860 (1961), there were several confessions; in *Reck v. Pate*, 367 U.S. 433, 6 L. Ed. 2d 948, 81 S.Ct. 1541 (1961), there were two confessions. Yet in each of those cases this Court found one confession involuntary and reversed the convic-

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[45] R.T. 840-50.

[46] R.T. 874-6.

tions. If an involuntary confession is used, other confessions or other evidence of guilt will *not* support the conviction.

Regardless of other evidence, consistent or inconsistent, Atchley's recorded confession was vital to his conviction and to his death sentence.

Atchley's Confession Was Involuntary As a Matter of Law

An Involuntary Confession Is a Violation of Due Process

An involuntary confession is a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States. As stated in *Jackson v. Denno*, at 376:

> "It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession . . ."

The reasons for that axiom have been defined by this Court:

> "It is now unescapably clear that the Fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of the '*strongly felt attitude of our society that important human values are sacrificed* where an agency of the government, in the course of securing a confession, wrings a confession out of an accused against his will,' *Blackburn v. Alabama*, 361 U.S. 199, 206-207, 4 L. Ed. 2d 242, 248, 80 S.Ct. 274, and because of 'the deep-rooted feeling that the *police must obey the law while enforcing the law;* that in the end *life and liberty can be as much endangered from illegal methods used to convict those thought to be crimi-*

> *nals as from the actual criminals themselves.' Spano v. New York,* 360 U.S. 315, 320-321, 3 L. Ed. 2d 1265, 1270, 79 S.Ct. 1202." *Jackson v. Denno,* 385-6. (Emphasis added) Accord: *Haynes v. State of Washington,* 519.

This Court has applied its decisions on involuntary confessions retroactively. The Court's making them retroactive is express recognition of the danger of involuntary confessions convicting the innocent, and of the gravity of involuntary confession cases; *Johnson v. New Jersey,* 384 U.S. 719, 16 L. Ed. 2d 882, 86 S.Ct. 1772 (1966), at 727-30; *Linkletter v. Walker,* 381 U.S. 618, 14 L. Ed. 2d 601, 85 S.Ct. 1731 (1965), at 639; *Davis v. North Carolina,* 384 U.S. 737, 16 L. Ed. 2d 895, 86 S.Ct. 1761 (1966), at 740.

Atchley's Confession Was Involuntary As a Matter of Law

In protecting against involuntary confessions, the Court has used various language to define when a confession is involuntary. The Court has said that a confession is involuntary when: the accused's will has been overborne; or the confession is not the product of a rational intellect; or it is not the result of the exercise of free choice; or it is the end product of coercive influences; *Jackson v. Denno,* at 390; *Davis v. North Carolina,* at 752; *Reck v. Pate,* at 440-1; *Culombe v. Connecticut,* at 602.

Whatever the words used by the Court, the message is clear: a confession must be a voluntary act. And by whatever words it is measured, Atchley's confession was involuntary.

Atchley is a man of sub-standard intelligence with brain damage. He was unable to read or write anything except his own name. After his arrest for murder, he was without sleep for forty-eight hours and was in a state of shock. He was kept isolated. He requested an attorney several times, but an attorney was denied him until after he confessed.

He was not advised of his rights. And he was finally deceived into making a confession by a friend whom the police recruited. The confession was secretly recorded. The deceit used to obtain the recorded confession even included an offered reward; that is, if Atchley would give Travers the facts, Atchley's children would get insurance money.

Those facts are easily measured against the standards defined by this Court. Most important are two recent decisions, after the District Court's decision in this case:

In *Greenwald v. Wisconsin*, the Court reversed a conviction because of an involuntary confession. The Court held the confession to be involuntary because of three facts (521):

(1) "the lack of counsel, especially in view of the accused's statement that he desires counsel;"

(2) "the lack of food, sleep and medication;" and

(3) "the lack or inadequacy of warnings as to constitutional rights."

Each of these facts also applies to Atchley's involuntary confession. The Court said about these facts:

> "Considering the totality of these circumstances, we do not think it credible that petitioner's statements were the product of his free and rational choice. Accordingly, the [conviction] below is reversed." (521)

In *Darwin v. Connecticut*, this Court again reversed a conviction because of an involuntary confession. The Court held the confession involuntary because the accused's attorney had made attempts to communicate with him, while he was kept incommunicado for thirty to forty-eight hours (349). The Court said that was enough to make the confession involuntary:

> "Considering the 'totality of the circumstances,' we conclude that the court erred in holding that the confession and the partial reenactment were voluntary." (349)

Atchley's circumstances are even more extreme. In addition to the other injustices surrounding his confession, Atchley asked for and was denied a lawyer eight or ten times.[47]

Other decisions of the Court support the results of *Greenwald* and *Darwin*.[48] The Court has enumerated several factors showing when a confession is involuntary. Each of the factors applies to Atchley:

(1) The accused must not be denied an attorney. The Court has held that although its rulings in *Escobedo v. Illinois*, 378 U.S. 478, 12 L. Ed. 2d 977, 84 S.Ct. 1758 (1964), and *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S.Ct. 1602 (1966), are not alone retroactive, they are retroactive to the involuntariness of a confession; *Darwin v. Connecticut*, at 349; *Johnson v. New Jersey*, at 730; and *Davis v. North Carolina*, at 740.

In regard to the police denying Atchley an attorney, we believe that recent holdings of this Court lead to an important conclusion: if an accused is denied an attorney, his confession *must* be deemed involuntary for that reason alone. This conclusion was implied in the Court's opinions in *Greenwald* and *Darwin*. And this was the Court's holding in *Massiah v. United States*, 377 U.S. 201, 12 L. Ed. 2d 246, 84 S.Ct. 1199 (1964). In *Massiah* the accused was indicted, retained a lawyer, pleaded not guilty, and was released on bail. While free on bail and without the presence of his counsel, the accused conversed with a co-defendant, unaware that the co-defendant had permitted government agents to record their conversation. His conviction was reversed on the ground that his right to counsel had been violated by that recording outside the presence of his lawyer. *Massiah* was affirmed in *Beatty v. United States*, 389 U.S. 45, 19 L. Ed. 2d 48, 88 S.Ct. 234

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[47] A. 154-5, 189-90, 206.

[48] *Greenwald* and *Darwin* are similar to this case for another reason: they involved trials prior to the Court's decisions in *Escobedo* and *Miranda*; see *infra*. Yet the Court reversed both convictions.

(1967); see also *Spano v. New York,* 360 U.S. 315, 3 L. Ed. 2d 1265, 79 S.Ct. 1202 (1959) (concurring opinion). The right of an accused to counsel is protected by the Constitution and this Court. So is the right of an accused to be free from coercion of his confession. These two rights come together at one point: if an accused is denied counsel, his confession must be deemed involuntary for that reason alone. Such was the situation with Atchley, whose frequent requests for an attorney were denied until after he confessed.

But we need not base Atchley's position on just that point; there are additional factors in his involuntary confession:

(2) Atchley was not advised of his right to remain silent or of his other constitutional protections. This fact also indicates that the confession was involuntary; *Greenwald v. Wisconsin; Davis v. North Carolina;* and *Haynes v. Washington,* at 516-7.

(3) The inducement for Atchley's confession is also compelling. Atchley thought he was giving Travers information which Travers needed to obtain insurance money for the children. In *Malloy v. Hogan,* 378 U.S. 1, 12 L. Ed. 2d 653, 84 S.Ct. 1489 (1964), the Court repeated its rule that a confession must not be:

> ". . . obtained by any direct or implied promises, however slight . . ." (p. 7)

Here, the inducement of financial gain for Atchley's talking was *express.* The insurance was mentioned approximately nine times during the recorded confession; see footnote 22.

(4) Another important factor is an accused's intelligence and capacity to resist; *Spano v. New York; Culombe v. Connecticut; Reck v. Pate; Davis v. North Carolina.* Atchley was illiterate, had an I.Q. of 60, and suffered from brain damage. His intelligence and capacity for resistance were far below the accuseds in the cited cases.

(5) The fact of Travers deceiving Atchley is also significant. Atchley was talking in confidence to his friend and trusted adviser about insurance money. But Travers had been recruited by the police to talk with Atchley for a different purpose. The obtaining of a confession by the use of *any* deceit has been criticized by this Court. It condemned similar deceits in *Leyra v. Denno, Massiah v. United States,* and *Lisenba v. California,* 314 U.S. 219, 86 L. Ed. 166, 62 S.Ct. 280 (1941). In *Spano v. New York* this Court included within its criticism a quotation which is particularly applicable here (323):

> "An open foe may prove a curse,
> But a pretended friend is worse."

(6) A final factor is the Court's decision in *Katz v. United States,* 389 U.S. 347, 19 L. Ed. 2d 576, 88 S.Ct. 507 (1967), that there is a violation of constitutional rights in secretly recording a confidential communication without prior judicial approval. That decision must contribute to the involuntariness of Atchley's confession.[49]

A confession is determined to be involuntary by the totality of all of the circumstances; *Clewis v. Texas,* 386 U.S. 707, 18 L. Ed. 2d 423, 87 S.Ct. 1338 (1967); *Darwin v. Connecticut; Greenwald v. Wisconsin; Culombe v. Connecticut.* Here, the totality is overwhelming: a mentally inferior accused; isolated without sleep for forty-eight hours and in shock; denied an attorney (which fact alone should be conclusive); not advised of his constitutional rights; a confession secretly recorded by the deceit of a friend; and the confession obtained by the inducement of insurance money.

We submit that the confession is involuntary as a matter of law; and that the judgment of the District Court should

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[49]The State cannot distinguish *Katz* with its argument that Atchley's statements were knowingly exposed to some outsider (Petitioner's Brief, 20). Both Atchley and Katz were obviously talking to *somebody* when their words were secretly recorded by the police.

be modified to require a new trial, and as so modified, affirmed. In asking the Court to rule as a matter of law, we do so in awareness of the Court's recent decision in *Sigler v. Parker,* ___ U.S. ___, 24 L. Ed. 2d 672, 90 S.Ct. ___ (1970). The Court there reversed a Court of Appeals finding that a confession was involuntary, and directed that a hearing be held by the state under *Jackson v. Denno,* However, we respectfully submit that the *Sigler* decision does not preclude the result we ask in this case:

First, the primary issue in *Sigler* was not that the confession was involuntary. Rather, *Sigler* was a *procedural* decision that the trial court's hearing on involuntariness had been constitutionally inadequate. In correcting that procedural deficiency, the proper remedy was to refer the matter back to the state to correct the procedure. However, our point here is *substantive.* That is, we believe that from the record Atchley's confession was involuntary as a matter of law. Indeed, the State itself argues that there are no questions of fact.[50]

Second, courts often hold that issues can be decided as a matter of law and need not be decided factually. These decisions occur frequently in the judicial process, in rulings upon such matters as demurrers, motions to dismiss, and summary judgments. And appellate courts frequently make rulings as a matter of law without the necessity for further lower court proceedings. The point is that sometimes the established facts and the law combine to compel a conclusion which no further evidence could refute. This Court has made such determinations as a matter of law in confession cases. For example, in both *Darwin v. Connecticut* and *Greenwald v. Wisconsin,* the Court concluded that the confessions were involuntary and reversed the convictions. We believe that that is the situation in Atchley's case. The factors enumerated above, which are already established in the record, compel the conclusion that the confession was involuntary as a matter of law.

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[50]Petitioner's Brief, 23-24.

The Hearing on the Involuntary Confession Was Constitutionally Inadequate

Even if Atchley's confession is not held involuntary as a matter of law—as we believe it should be—the judgments of the lower courts should still be affirmed. The judgments should be affirmed because the hearing on the involuntary confession was constitutionally inadequate.

The District Court expressly ruled that:

> "the trial court did not reliably determine whether Atchley's confession was voluntary or involuntary. The hearing on voluntariness was not fully adequate . . ."[51]

The District Court ordered the State to provide a new hearing on voluntariness.[52] That decision was correct and should be affirmed.

An Accused Must Receive a Constitutionally Adequate Hearing on the Voluntariness of His Confession

This Court has directed that when an accused raises the involuntariness of his confession he must receive a hearing. That hearing must be a fair one, in which the issue of involuntariness is squarely presented and resolved. As the Court said in *Jackson v. Denno*, at 380:

> "A defendant objecting to the admission of a confession is entitled to a *fair hearing* in which both the underlying factual issues and the voluntariness of his confession are *actually and reliably determined.*" (Emphasis added)

And at 390:

> "Expanded concepts of fairness in obtaining confessions have been accompanied by a correspond-

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[51] A. 76.

[52] A. 78.

> ingly greater complexity in determining whether an accused's will has been overborne—facts are frequently disputed, questions of credibility are often crucial, and inferences to be drawn from established facts are often determinative. The over-all determination of the voluntariness of a confession has thus become an *exceedingly sensitive task, one that requires facing the issue squarely, in illuminating isolation* and unbeclouded by other issues and the effect of extraneous but prejudicial evidence." (Emphasis added)

Atchley's hearing was constitutionally inadequate, for three separate reasons. First, the trial judge did not decide whether the confession was voluntary or involuntary, as required by *Jackson v. Denno* and subsequent cases. Second, the hearing was conducted partially in the presence of the jury. And third, the hearing excluded evidence relevant to involuntariness. Any one of these factors alone would require a new hearing; here, they are all present. We will discuss each in order.

Atchley's Hearing Was Constitutionally Inadequate Because the Trial Judge Did Not Decide Whether the Confession Was Voluntary or Involuntary

This Court requires that a decision on the voluntariness of a confession must be made by the trial judge; *Jackson v. Denno.* In *Sims v. Georgia,* 385 U.S. 538, 17 L. Ed. 2d 593, 87 S.Ct. 639 (1967), the Court said that the trial judge's decision "must appear from the record with unmistakable clarity" (544); accord, *Sigler v. Parker.*

The trial judge did not make such a decision here. Instead, the judge simply admitted the confession into evidence with no decision on voluntariness and with no guidance to the jury. This is demonstrated by the record:

Atchley's counsel objected to the recording[53] and raised the issue of involuntariness.[54] There was then a hearing on the confession in the judge's chambers.[55] The tape was played for the judge,[56] and he recognized that the statements on the recording were to be treated as a confession.[57] He directed that the jury be reconvened and a foundation be laid before the recording was played.[58] The judge had *not* ruled upon voluntariness when the hearing in chambers ended; indeed, the hearing had not then been completed.

The hearing then continued before the jury.[59] Travers testified to lay the foundation.[60] There was then some limited cross-examination.[61] The jury heard both the foundation and the cross-examination, which were obviously on the issue of voluntariness. The jury also heard evidentiary objections and rulings.[62] The recording was then played to the jury.[63] It was offered in evidence, and the trial judge simply said that Atchley's objections "are noted and the Court has ruled upon them."[64] The testimony regarding the confession then continued and was merged into

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[53]A. 86, 159, 160.

[54]A. 86-140.

[55]A. 86 et seq.

[56]A. 95-107.

[57]A. 127, 131. The California Supreme Court agreed that the recording was to be treated as a confession for purposes of voluntariness; *People v. Atchley*, A. 54-6.

[58]A. 127, 131-2.

[59]A. 140.

[60]A. 140-5.

[61]A. 146-159.

[62]A. 140-160.

[63]A. 160

[64]A. 160.

the other evidence.[65] The record contains no statement showing that the judge determined the confession to be "voluntary" or "involuntary." Finally, the jury was not given any instructions on the voluntariness or involtunariness of the convession.[66]

What was the net result? The jury heard the confession. They listened to conflicting evidence on whether it was involuntary. They heard it admitted into evidence, but they were not told whether the judge had found it voluntary. They probably interpreted the judge's "noting" of objections as simply a ruling on the *evidentiary* objections they had heard. They listened to the evidence on the confession continue and were not informed of the conclusion. They were not given any instructions pertaining to the confession. The jury would logically assume that the confession, and the issue of its involuntariness, had been presented *to them*, along with all of the other evidence and issues. We can never know what decision the jury reached on involuntariness, since they simply wrapped up all of the issues in a general verdict. This is precisely the procedure which *Jackson v. Denno* held unconstitutional.[67] All of the evils condemned by *Jackson v. Denno* (380 and footnote 12) are present here.

This same procedure was again condemned by the Court in *Boles v. Stevenson*, 379 U.S. 43, 13 L. Ed. 2d 109, 85 S.Ct. 174 (1964): A confession was offered at trial. The defense moved to strike it as involuntary. The motion was overruled without comment and without a ruling on the involuntariness. The Supreme Court held that the procedure was improper (45):

> "In light of this practice, we cannot ascertain on this record whether the trial judge declined to hold a hearing and *declined to rule explicitly on volun-*

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[65]A. 160 et seq.

[66]C.T. 126 et seq.

[67]The Court has held that *Jackson v. Denno* applies retroactively; see pages 12 above and 33 following.

> *tariness* because he thought there could not be any issue in the light of defendant's not guilty plea, because he thought the confession was in fact voluntary, or because he thought the *objections were inadequate or untimely. Hence we do not know if the trial judge decided voluntariness, one way or the other, and, if he did, what standard was relied upon.* We think the procedures were not 'fully adequate to insure a reliable and clear-cut determination of the voluntariness of the confession.'" (Emphasis added)

And later, this Court spoke again in *Sims v. Georgia.* As here, there was no actual ruling in the *Sims* record showing that the trial judge determined voluntariness (541). The confession was presented to the jury without giving them a ruling by the judge (542). The Court said:

> "This is the exact procedural device which is proscribed by the rule in *Jackson.*" (542)

The Court emphasized that although the trial judge need not make formal findings of fact or write an opinion,

> "his conclusion that the confession is voluntary *must appear from the record with unmistakable clarity.*" (544) (Emphasis added)

In *Pinto v. Pierce*, 389 U.S. 31, 19 L. Ed. 2d 31, 88 S.Ct. 192 (1967), the Court cited its prior holdings that (32):

> ". . . a defendant's constitutional rights are violated when his challenged confession is introduced without a determination by the trial judge of its voluntariness . . ."

Most recently, the Court made the same decision in *Sigler v. Parker.*

The record in Atchley's case discloses no decision by the trial judge on the voluntariness of his recording. The State argues that the judge's admitting the confession into evi-

dence and saying that objections "are noted and the Court has ruled upon them" was a finding of voluntariness.[68] But that is not constitutionally adequate for several reasons. First, this is hardly the "unmistakable clarity" required by *Sims*. Second, admitting the confession into evidence was not sufficient to constitute a ruling on voluntariness in *Sims*, *Boles*, or *Sigler*. And in *Jackson v. Denno*, the Court said (footnote 8) that the judge's conclusions and findings must be express or ascertainable from the record. Finally, the judge's statement that he "has ruled upon"[69] the objections was incorrect if meant to apply to the voluntariness of the confession: he had made *no* prior ruling that the confession was voluntary. His statement was at best misleading, because of the many *evidentiary* objections the jury had just heard.[70] We wish to emphasize to the Court the impact upon the jury: The jury heard conflicting testimony on whether the confession was involuntary. It heard other objections. It heard the confession. Then all it heard from the judge was that the objections were "noted" and had been "ruled upon." Having heard the confession, the evidentiary objections, the conflicting evidence on involuntariness, and all of the other evidence in the lengthy trial, the jury was left to bring in a general verdict without any instructions on the confession. This is what *Jackson v. Denno* condemns.[71]

The State argues[72] that the California procedure at the time of Atchley's trial was the so-called "Massachusetts rule." That is, the judge was to make the initial determina-

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[68]Petitioner's Brief, 16. A. 160.

[69]A. 160.

[70]A. 140-160.

[71]We do not contend that in all cases the jury must be specifically told of the judge's ruling. But the judge must in fact rule.

[72]Petitioner's Brief, 22-3.

tion as to involuntariness, and if there was an issue, was to submit it to the jury with instructions on their final power; *People v. Bevins*, 54 Cal. 2d 71, 77, 351 P.2d 776 (1960). However, that is *not* what was done in Atchley's trial. The trial judge made no ruling on voluntariness, and he did not instruct the jury that they had a role to perform. The State can hardly contend that Atchley's trial was proper when the procedures required by the State and *People v. Bevins* were not followed.[73]

The State also argues that Atchley's counsel did not request instructions on the confession.[74] But the burden to give adequate instructions on the confession was on the trial court. In *People v. Bevins* the California Supreme Court said (77):

> "... while it was within [the trial judge's] discretion to permit the confession to be read to the jury, *he was also required to submit to the jury for its determination under proper instructions the question whether under all the circumstances the confession was made freely and voluntarily.*"

This decision that the trial court *must* give appropriate instructions has been followed in subsequent cases by the California Supreme Court; e.g., *People v. Lara*, 67 Cal. 2d 365, 432 P.2d 202 (1967); *People v. Eli*, 66 Cal. 2d 63, 424 P.2d 356 (1967); *People v. Sanchez*, 65 Cal. 2d 814, 423 P.2d 800 (1967).

The State finally argues that there was no conflict in the evidence and therefore no need to submit the issue of involuntariness to the jury.[75] The State is incorrect.

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[73]The District Court inferred this in footnote 7 of its opinion, A. 78.

[74]Petitioner's Brief, 11, 23.

[75]Petitioner's Brief, 23-24.

Because there was substantial evidence from which the jury could find that the confession was involuntary, that issue had to be submitted to the jury under the State's procedure. The facts discussed on pages 12 through 16 above are certainly such substantial evidence of involuntariness. And as we have stated, we believe that those facts are so compelling as to require a ruling of involuntariness as a matter of law.

Further, since the trial judge did not rule upon the voluntariness or involuntariness of the confession, he had to submit the issue to the jury so that *someone* could decide.

We are left with the simple fact that the omission condemned by *Jackson v. Denno* was committed here. The trial judge made no decision on the issue of involuntariness. And that omission was compounded by the fact that the jury received no instructions on what function they were to perform with respect to the contested confession.

The Hearing Was Constitutionally Inadequate Because It Was Conducted in the Presence of the Jury

The hearing on involuntariness was also improper because it was conducted partially in front of the jury.

The Court said in *Jackson v. Denno* that the hearing on involuntariness should not be before the jury which hears the question of guilt or innocence:

> "[The accused contends] that the issue of his confession should not have been decided by the convicting jury but *should have been determined in a proceeding separate and apart from the body trying guilt or innocence.* So far *we agree* and hold that he is now entitled to such a hearing in the state court." (394) (Emphasis added)
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> "It is both practical and desirable that in cases to be tried hereafter *a proper determination of voluntariness be made prior to the admission of the confes-*

sion to the jury which is adjudicating guilt or innocence." (395) (Emphasis added)

"Whether the trial judge, or another judge, or another jury, *but not the convicting jury,* fully resolves the issue of voluntariness is not a matter of concern here." (Footnote 19) (Emphasis added)

We believe that the requirement of this Court in *Jackson v. Denno* is clear: the hearing on involuntariness must not be in front of the jury that decides the issue of guilt or innocence. The purpose of that requirement is to prevent grave injustices inherent in involuntary confessions. It is to prevent the jury from hearing an improper confession; and indeed, it is to prevent the jury from hearing that the accused has made a confession at all, until the trial judge decides the confession can properly come before the jury. That purpose has its roots in the nature of a confession. A confession is dramatic and highly emotional to a lay jury. In a confession the jury hears the words of the accused saying things which incriminate him. That dramatic impact was even more emotional in Atchley's case, because the jury heard the confession in a recording of his voice, and not just in a writing or in the testimony of another witness.

Holding the hearing on the confession in front of the jury has other dangers. It forces the accused to make choices before the jury which are really no choices at all: Should he present evidence that the confession is involuntary, and thereby risk reinforcing the language of the confession in the minds of the jury? Or should he attempt to minimize the confession by ignoring it, and thereby risk leaving the jury with the impression that it is undenied? And once the confession is before the jury, should he attack or embrace the substance of what the confession said? Should he challenge that substance and make himself appear to be a liar? Or should he agree to the substance and make himself appear to have "confessed"? These unjust choices are forced upon the accused *even though the confession is*

ultimately ruled involuntary. Once the jury has heard the confession, that bell has rung; and later ruling it involuntary cannot "unring" it. The State attempts to further these unjust choices in this case. The State argues[76] that Atchley's counsel embraced the confession in his closing argument.[77] But counsel's argument was merely his Hobson's choice of attempting to minimize the significance of the involuntary confession after it was in evidence. Counsel's choice was forced upon him by the jury hearing the involuntary confession and the circumstances surrounding it. His argument contrasts markedly with the very lengthy and detailed objections which he made to the confession.[78]

Jackson v. Denno correctly prevents such injustice by requiring that hearings on involuntariness not be before the jury.

The District Court interpreted *Pinto v. Pierce* as permitting the hearing to be in front of the jury.[79] But if that is the meaning of this Court's statement on page 32 of *Pinto*, we believe it should be clarified. The question of whether the *procedure* for determining involuntariness is constitutional should not depend upon whether the *substantive result* of that procedure is a finding of voluntariness or a finding of involuntariness. At the time of the hearing, no one knows whether the finding will be "voluntary" or "involuntary." The correctness of the procedure for making that finding must stand on its own feet. And for the reasons stated, that procedure should require that the jury

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[76]Petitioner's Brief, 10, 23.

[77]R.T. 2587.

[78]A. 86-160. The State's argument also contrasts markedly with present California procedure. Section 402(b) of the California Evidence Code, which became effective on January 1, 1967, requires the trial judge to determine the admissibility of a confession out of the presence of the jury if any party so requests.

[79]A. 77-8.

not hear the matter. Any inference to the contrary in *Pinto* should be disapproved. But even further, we do not think that the language in *Pinto* should apply to Atchley's case. (1) In *Pinto,* the accused *consented* to having the hearing before the jury. Atchley's counsel objected to the confession, and the hearing was held initially in chambers. (2) In *Pinto,* the hearing was otherwise adequate and no unfair consequences resulted to the accused. As we discuss in this brief, Atchley's hearing was inadequate for many reasons, with highly unfair consequences. The hearing in front of the jury must also be considered in light of the fact that the judge never ruled on voluntariness; he just submitted everything to the jury.

The Hearing Was Constitutionally Inadequate Because Relevant Evidence Was Excluded

Atchley's hearing was constitutionally inadequate for another separate reason. At the hearing, the trial judge excluded evidence on involuntariness which should have been admitted:

(1) No evidence was allowed that Atchley had requested and been denied an attorney several times before his confession. The trial court told the jury to disregard that offered evidence.[80] This Court has held the absence of an attorney to be highly relevant to voluntariness in the cases discussed on page 14 of this brief. The California Supreme Court agreed that this exclusion was error.[81]

(2) No evidence was allowed to show that: Atchley believed his talk with Travers was confidential; Atchley didn't know a recording was being made; and Atchley was deceived by his friend.[82] Yet this Court has said that these are important factors in determining whether a confession

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[80] A. 154-5.

[81] A. 58.

[82] A. 134-5, 149, 156-7, 90-1.

is voluntary; *Spano v. New York; Leyra v. Denno; Massiah v. United States; Lisenba v. California.* The fact of the secret recording is particularly important in view of the Court's decision in *Katz v. United States.*

(3) The trial court also prevented testimony of the conversation between Travers and the sheriff who led Travers to deceive Atchley.[83] And Atchley was not permitted to examine the sheriff before Travers testified.[84] These inquiries related directly to the secret recording, the deceit practiced upon Atchley, Atchley's lack of knowledge of that deceit, and the inducement of insurance proceeds for his cooperation.

In addition, certain important inquiries should have been made by the trial court:

(4) There is no record that the police advised Atchley of his constitutional rights. In *Davis v. North Carolina,* this Court said that this was significant in considering the voluntariness of statements later made; accord, *Greenwald v. Wisconsin.* As the Court said in *Haynes v. Washington* (516-517):

> "Beyond even the compelling nature of our precedents, however, there is still another reason for refusing to consider the present inquiry foreclosed by the verdict of the jury to which the issue of voluntariness of the confession was submitted. The jury was instructed, in effect, not to consider as relevant on the issue of voluntariness of the confession the fact that a defendant is not reminded that he is under arrest, that he is not cautioned that he may remain silent, that he is not warned that his answers may be used against him, or that he is not advised that he is entitled to counsel. Whatever independent consequences these factors may otherwise have, *they are unquestionably attendant circumstances which*

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[83] A. 156-7.

[84] A. 135-9.

the accused is entitled to have appropriately considered in determining voluntariness and admissibility of his confession." (Emphasis added)

(5) Evidence regarding Atchley's lack of intelligence and education was objected to by the State.[85] However, such evidence was held material to involuntariness in *Culombe v. Connecticut, Reck v. Pate, Davis v. North Carolina, Spano v. New York,* and *Greenwald v. Wisconsin.*

In summary, the hearing on Atchley's confession was constitutionally inadequate for three separate reasons. First, the trial judge made no decision on the voluntariness or involuntariness of the confession, as required by *Jackson v. Denno* and other cases. Second, the hearing was conducted partially in front of the jury, a practice condemned by *Jackson v. Denno.* Finally, a great quantity of evidence was excluded which this Court has held is relevant to the issue of involuntariness. Any one of these reasons alone would compel the conclusion that Atchley's hearing was constitutionally inadequate. The presence of all three is overwhelming.

At the very least, the judgments of the lower courts should be affirmed that Atchley is entitled to a hearing on the issue of involuntariness.

The State's Arguments Regarding the Confession and the Hearing Demonstrate No Ground for Reversal of the District and Circuit Courts

We will now respond to arguments made by the State regarding the confession and the trial court hearing. We will show that the State demonstrates no ground for reversal of the District and Circuit Courts.

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[85] A. 146-8.

The First Conversation Between Travers and Atchley Does Not Save the Involuntary Confession

The State's main argument concerns a prior conversation between Travers and Atchley. The State argues that it made the confession voluntary as a matter of law.[86] There are several answers, both factual and legal.

First, Travers did not directly testify to the substance of his first conversation with Atchley. The State did not examine Travers on what Atchley said in that conversation. While Travers made some references to it in voir dire and cross-examination, there was no direct testimony of what Atchley told Travers. This is demonstrated by the fact that if all references to the involuntary confession were stricken from the record, there would be no evidence of the first conversation between Travers and Atchley.

Second, there is testimony that the first conversation differed in some degree from the recorded confession.[87] In the recorded confession Travers aggressively pursued the questioning of Atchley. All Travers really needed for his insurance company were the names and ages of the children.[88] But in the recorded confession, he went far beyond that requirement, and used aggressive examination techniques in questioning Atchley about the death.[89] With these material differences, the first conversation cannot support the confession. But even assuming, solely for the sake of argument, that Travers could or did testify to a corroborating conversation, the State's argument is wrong legally:

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[86]Petitioner's Brief, 25-7.

[87]A. 158, 172.

[88]A. 148, 153.

[89]A. 98, 99, 152, 158, 172-3.

The State assumes that the only principle barring involuntary confessions is inaccuracy. It argues that if it can establish accuracy by another conversation, the involuntary confession is then proper. Both the assumption and the argument are wrong. They would lead to the conclusion that as long as a confession is accurate, it can be *tortured* from an accused. But this Court has frequently stated that the principles barring involuntary confessions are not just ones of accuracy. The principles are fundamental human rights and the necessity for police obeying the law.[90] In *Rogers v. Richmond,* 365 U.S. 534, 5 L.Ed.2d 760, 81 S.Ct. 735 (1961), this Court held that without regard to the truth or falsity of a confession, it is a violation of due process to use an involuntary confession; accord, *Jackson v. Denno,* at 376, 384-6.

The State's argument has also been answered by many decisions of this Court holding that if an involuntary confession is used there is a violation of due process which requires reversal, even if there were other confessions and other evidence sufficient to prove guilt.[91]

Trial Court Evidentiary Rules Cannot Exclude Constitutional Requirements

The State's other arguments regarding the confession and the trial court hearing[92] are based on rules of evidence. That is, the State argues that the rulings of the trial court were correct under state evidentiary law. But this argument assumes that rules of evidence control requirements of constitutionality. The opposite is true. Evidentiary rules must bow to the requirements of the Constitution; as this Court said in *Fay v. Noia,* 372 U.S. 391, 9 L.Ed.2d 837, 83 S.Ct. 822 (1963):

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[90]See authorities, pages 11-12 of this brief.

[91]Cited on page 10 of this brief.

[92]Petitioner's Brief, 17-24.

> "State procedural rules plainly must yield to this overriding federal policy." (426-7)

The Constitution requires that an adequate hearing be held on the issue of voluntariness. If that hearing is not adequate, the inadequacy cannot be explained away by evidentiary rulings.

Further, the State concedes that certain evidence rulings were indeed erroneous.[93] The State can only argue that those errors were not prejudicial.[94] But that argument is contrary to the decisions of this Court. In *Chapman v. California*, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824, (1967), this Court said:

> "... there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error..." (23)

The Court's reference in that quotation specifically includes a "coerced confession" (footnote 8).

Finally, the State questions whether the District Court was correct in holding that the trial court had followed an erroneous standard of law.[95] The State's argument is apparently that there has been no new law on confessions. But there have been significant developments in constitutional standards for confessions. To name a few:

(1) *Jackson v. Denno* was decided in 1964. That case made three significant changes. (a) It held that the trial judge must rule on the voluntariness of the confession. (b) It held that the hearing on voluntariness must not be before the jury. (c) It further defined the standards of adequacy for voluntariness hearings. *Jackson v. Denno* was then held to be retroactive by the Court in *Johnson v. New Jersey* and *Linkletter v. Walker*.

(2) The Court decided *Escobedo* and *Miranda*. This Court later held those decisions to be retroactive on the

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[93]Petitioner's Brief, 19.

[94]Petitioner's Brief, 19, 27.

[95]Petitioner's Brief, 24.

issue of voluntariness; *Darwin v. Connecticut*, *Johnson v. New Jersey*, and *Davis v. North Carolina*.

The retroactive application of the Court's standards also answers the State's argument regarding evidentiary rules. Evidentiary rules must bow to the requirements of the Constitution.

The District Court Correctly Determined That the Presumption of 28 U.S.C. § 2254(d) Had Been Rebutted

One of the State's principal arguments is that the District Court "refused" to apply the presumption of 28 U.S.C. § 2254(d).[96] The District Court did not refuse to apply that section. It addressed itself directly to that code section and concluded:

> "... the Court is of the opinion that [Atchley] has successfully rebutted the presumption contained in 28 U.S.C. § 2254(d)..."[97]

The State can only argue that the District Court and Court of Appeals somehow misapplied the section; that is, that the presumption applied and was not overcome. However, the courts' application of the section was consistent with the legislative intent, the language of the section, and the facts. In responding to the State's argument we will: (1) define the legislative intent of the section; (2) show that Atchley's involuntary confession was within the exceptions to the presumption; and (3) show that in any event the presumption was successfully rebutted.

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[96]Petitioner's Brief, 2, 13.

[97]A. 78.

The Legislative History of Section 2254(d) Demonstrates That Its Purpose Is To Extend, Not Limit, Constitutional Protections to Accuseds

Subsection (d) was added to Section 2254 by Public Law 89-711, § 2, 80 Stat. 1105. That subsection was passed to codify this Court's decision in *Townsend v. Sain*, 372 U.S. 293, 9 L.Ed.2d 770, 83 S.Ct. 745 (1963). In *Townsend v. Sain* the Court directed the District Courts to inquire into the constitutionality of certain state court convictions. This Court's directions in *Townsend v. Sain extended* constitutional protections and were approved and codified by Congress in subsection (d).

The intent of Congress to extend constitutional protections in subjection (d) also appears in the language of the committee report; Senate Report No. 1797, Eighty-Ninth Congress, Second Session, pages 1 through 3. The report quoted with approval a statement that its intended purpose was to have the state courts strengthen their constitutional safeguards:

> "It is the opinion of your committee that the proposed legislation, if enacted, will be *a strong inducement to the States that have not already done so to provide adequate post-conviction remedies and procedures and to make and keep available records of evidentiary matter* in criminal and post-conviction proceedings, and to the State courts in criminal proceedings *to safeguard the constitutional rights of defendants.*" (Page 3) (Emphasis added)

The State argues that subsection (d) was to establish a "qualified doctrine of res judicata in federal habeas corpus proceedings brought by state prisoners."[98] But the State has misquoted the legislative history. The language of the committee report of "a qualified application of the doctrine of res judicata" appears in the portion of the report dealing

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[98]Petitioner's Brief, 14.

with amendment of Section 2244, not amendment of Section 2254. Section 2244 concerns prior *federal* court convictions. It therefore appears that the "qualified doctrine of res judicata" was intended by Congress to apply to prior *federal* court convictions, not prior *state* court convictions.[99]

The intent of Congress was further expressed by its action on the 1968 legislation quoted by the State.[100] The provisions of that bill were *not* passed by Congress. Congress deleted the State's language from its legislation, and that deletion is an expression of its satisfaction with existing standards.

It is therefore apparent that passage of subsection (d) was not intended by Congress to be a *limitation* on the constitutional protections extended by this Court. Rather, Congress codified those *extensions* of protection and expressed its concern over the adequacy of trial court[101] conviction procedures. With that legislative intent in mind, we now turn to the application of the presumption in Atchley's case.

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[99]The State's quoted language is contained in a letter attached to the committee report (page 4). However, it is the committee *report* that is authoritative; Stern and Gressman, *Supreme Court Practice*, 4th Edition, page 475.

[100]Petitioner's Brief, 14, footnote 7.

[101]In an attempt to strengthen its argument regarding subsection (d), the State claims that § 2254(d) applies to *appellate* court decisions as well as to trial court determinatons; Petitioner's Brief, 17, 35. We disagree with that claim: (1) The language of subsection (d) addressing itself to "a hearing on the merits of a factual issue" indicates that only trial court decisions are entitled to the presumption; and (2) this Court expressed the same conclusion in *Townsend v. Sain* (pages 316 and 296-297) and *Fay v. Noia* (pages 426-427 and 422). But that disagreement is not important here; the exceptions to Section 2254(d) govern this case, and even if the presumption were applied, it has been rebutted.

The Presumption Did Not Apply to Atchley Because His Involuntary Confession Was Within the Exceptions to the Presumption

Section 2254(d) contains express exceptions to the application of the presumption. That section states that the presumption exists "...unless the applicant shall establish or it shall otherwise appear..." that one of eight exceptions exists. This same "unless" language is repeated in the last paragraph of that subsection (d). The Court should note that those eight exceptions are taken from the standards of this Court in *Townsend v. Sain.* The following exceptions enumerated in subsection (d) apply to Atchley's confession and hearing:

> "(1) ... the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) ... the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) ... the material facts were not adequately developed at the State court hearing;
>
> (6) ... the applicant did not receive a full, fair, and adequate hearing in the State court proceeding;
>
> (7) ... the applicant was otherwise denied due process of law in the State court proceeding;
>
> (8) ... unless... the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record..."

The facts enumerated above in this brief demonstrate that the trial court proceedings were within one or all of those enumerated exceptions. We can state our conclusion regarding those exceptions and Atchley's trial court hearing no better than to quote the District Court:

> "In light of the above discussion, it is the conclusion of this Court that the trial court did not reliably determine whether Atchley's confession was volun-

> tary or involuntary. The hearing on voluntariness was not 'fully adequate to insure a reliable and clear-cut judicial determination of the voluntariness of the confession'. . ."[102]

The Presumption Was Rebutted

Even if Atchley's involuntary confession were not within one of the exceptions to the subsection—as we believe that it is—the result was still correct.

The District Court properly conducted the habeas corpus proceeding. It exercised the jurisdiction given to it by Section 2241. It reviewed the trial court transcript. And it performed its duty under Section 2243 to hear and determine the facts and dispose of the matter as law and justice required.

The most that the presumption of § 2254(d) did was to place upon Atchley some burden of rebuttal. Atchley met that burden. The District Court specifically found that any presumption had been "successfully rebutted."[103] That finding is supported by the facts discussed on pages 18 through 30 of this brief.[104] The District Court properly held that Atchley had successfully rebuted any presumption under Section 2254(d).

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[102]A. 76.

[103]A. 78.

[104]It is apparent from the language of the *second* paragraph of subsection (d) that the presumption defined there applies only at the "evidentiary hearing" in the "Federal court." It did not apply to the District Court determination here.

Federal Courts Must Continue To Examine the Federal Constitutionality of Trial Court Convictions

The State's Proposed Rule Would Eliminate Federal Court Examination of Constitutionality of Trial Court Convictions

The State's main objective[105] is to have this Court destroy the present federal system for examining the constitutionality of trial court convictions. The State wants a new rule.[106] The State's rule would restrict, to the point of eliminating, federal court examination of the constitutionality of state court convictions.[107] Federal court habeas corpus power would become ineffective.

The State's proposed rule must be read with care. But even a careful reading of the words does not adequately reveal the enormity of what the State is really asking. The State's new rule:

(1) Requires this Court to overrule[108]—not just modify, but overrule—its landmark decisions defining and protecting human rights;

(2) Requires this Court to reverse the grants of power and duty given by the Court and by Congress to the federal district courts;[109] and

(3) Requires this Court to release the administration of the *federal* Constitution to the *state* courts.

The State candidly admits that its objective is the reversal of this Court's decisions on the rights of accuseds.[110] But

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[105]Petitioner's Brief, 27 et seq.

[106]Petitioner's Brief, 28.

[107]The State did not present this argument in its petition for certiorari. Nevertheless, because of the importance of the State's objective, we are compelled to reply.

[108]Petitioner's Brief, 30.

[109]Petitioner's Brief, 35.

[110]Petitioner's Brief, 30.

the State fails to point out the consequences. This Court cannot accept the State's position without:

(1) Turning its back on the human rights which it has so carefully defined and protected;

(2) Turning its back on the powers and duties granted to the federal courts by Congress in Chapter 153 of Title 28 of the United States Code and by this Court in numerous decisions; and

(3) Abdicating the duties of the federal courts to fifty separate, geographically diverse, and procedurally diverse state court systems.

The rights put in jeopardy by the State's proposed rule are basic human freedoms. The State's argument jeopardizes not just isolated steps of procedure; it affects the administration of justice in every court in the nation. It jeopardizes not just some obscure statute or regulation; it affects the basic document of human liberty, the Bill of Rights. It jeopardizes not just trivial privileges; it affects the very touchstone of justice: the right of an accused to a fair trial for his life and liberty.

The State's rule must be rejected. Federal courts *must* examine the federal constitutionality of trial court convictions.

We will answer the State's argument as follows: (1) There are basic principles why the federal courts must examine constitutionality, and why habeas corpus is vital to that function. (2) The State's proposed rule is contrary to the intent of Congress. And (3) even if the State's rule were adopted, it would not result in reversal of this case.[111]

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[111]We also believe that the State's proposed rule is too vague for proper administration. But because of the reasons against the principle of the proposed rule, we will not discuss vagueness.

There Are Basic Principles Why Federal Courts Must Examine Constitutionality of Trial Court Convictions, and Why Habeas Corpus Is Vital to That Function

The real question posed by the State's proposed rule is this: Who will define the application of the federal Constitution to criminal trials, the state courts or the federal courts? The State's rule would virtually eliminate the authority of federal courts over the constitutionality of state convictions, and would restrict the power of federal courts to issue habeas corpus. But this Court and Congress have both concluded that the federal courts must make the final constitutional decisions. There are sound principles why the federal courts must examine constitutionality, and why habeas corpus is authorized for the enforcement of constitutional rights. We can do no better to express those principles than to refer to this Court's prior decisions. In doing so, we refer to them not just because they are precedent; but rather, because of the principles which that precedent defines.

Simply stated, the principles are these: The Constitution gives to every citizen of the United States certain rights. Those rights extend to him when tried in a state court. If a state trial denies him those rights, the Constitution has been violated. The Constitution is a federal document. The federal courts are the ones to see that the rights granted by the Constitution are enforced, and that they are enforced uniformly in state trials. The writ of habeas corpus is the procedure for that federal court enforcement.

In *Fay v. Noia,* the Court expressed the importance to human liberty of federal supervision of state convictions, and it discussed in detail the vital role of habeas corpus. The Court summarized its holdings at 426-7:

> " . . . we have consistently held that *federal court jurisdiction* is conferred by the allegation of an unconstitutional restraint and *is not defeated* by anything that may occur in the *state court proceedings. State procedural rules* plainly must yield to this overriding *federal* policy." (Emphasis added) Ac-

cord, *Reck v. Pate*, 435; *Haynes v. Washington*, 515.

We cite this Court's learned opinion in *Fay v. Noia* as a living statement of the principles which the State seeks to reverse in this case. Although we would like to quote that opinion in its entirety, that is of course impractical. Instead, we respectfully direct the attention of the Court to the principles stated in that opinion, and we quote a few brief passages:

> "*If the States withhold effective remedy, the federal courts have the power and the duty to provide it.* Habeas Corpus is one of the precious heritages of Anglo-American civilization. We do no more today than confirm its continuing efficacy" (441). (Emphasis added)
>
> "It should be unnecessary to repeat what so often has been said and what so plainly is the case: that the availability of the Great Writ of habeas corpus in the federal courts for persons in the custody of the States offends no legitimate state interest in the enforcement of criminal justice or procedure" (440).
>
> "*Our function of making the ultimate accommodation between state criminal law enforcement and state prisoners' constitutional rights* becomes more meaningful when grounded in the full and complete record which the lower federal courts on habeas corpus are in a position to provide" (438). (Emphasis added)

In *Townsend v. Sain* this Court directed the district courts to exercise their habeas corpus power to examine the constitutionality of state court convictions. The Court said (311-312):

> "The rule could not be otherwise. The whole history of the writ—its unique development—*refutes a construction of the federal courts' habeas corpus powers that would assimilate their task to that of courts of appellate review.* The function of habeas is different. It is to test by way of an original civil proceeding, independent of the normal channels of

review of criminal judgments, the very gravest allegations. *State prisoners are entitled to relief on federal habeas corpus only upon proving that their detention violates the fundamental liberties of the person, safeguarded against state action by the federal Constitution* . . .

"The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on *federal habeas corpus is plenary.* Therefore, where an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, *the federal court to which the application is made has the power to receive evidence and try the facts anew.*" (Emphasis added)

This Court has further held that many of its constitutional decisions must be applied *retroactively* to state court convictions. That retroactivity is a recognition of (1) the importance of the rights being protected, (2) the necessity for the federal courts to supervise those rights, and (3) the necessity for the state courts to comply with the requirements of the federal Constitution.

Indeed, all of the decisions of this Court reversing state court convictions for constitutional reasons are per se recognitions that the federal courts must be the final arbiters of the Constitution.

A consistent and effective application of the Constitution can only be achieved by that principle. Constitutional rights could not be effectively protected if each state were free to grant or withhold them; if each state were able to determine for itself what they meant; and if each state were then free to apply them to the facts—all without concern for examination by the federal courts.

Nor is this federal system an unwarranted intrusion upon the states; *Fay v. Noia,* 440. Both Congress and this Court require that state remedies be effectively exercised before federal habeas corpus power can be used. District court judges are selected from the states in which they reside. And district courts hear their cases in the separate states and

are conversant with the laws, procedures and policies of those states.

We believe that the holdings and the opinions of this Court have already rejected the State's proposed rule. The principles involved were fully considered by the Court in *Fay v. Noia* and *Townsend v. Sain*. Those principles are as valid today as they were in 1963. We can say no more than this Court has already said why the State's proposed rule must be rejected as repugnant to the Constitution. We will now respond to some of the specific arguments of the State in support of its proposed rule.

The State refers to recent decisions of this Court improvings state trial procedure.[112] From these improvements, the State argues that its procedures are now adequate. And it argues that the states have more incentive to do a good job of administering constitutional law. In response, we first point out that the important decisions of this Court on constitutional rights in state trials were *opposed* by the states. The states did not voluntarily embrace those rights, but adopted them only when required by this Court. Would accuseds have those rights today if this Court had not told the states they must provide them? And even if *some* states applied those rights voluntarily, would the existence of such rights in one state, and their denial in another, be compatible with the Constitution?[113] We believe that these questions answer themselves. If there were no habeas corpus inquiry into trial court convictions, the trial courts would lose—not gain—their incentives for constitutional procedures in the administration of justice and protection of human liberty. The improvements cited by the State would not have occurred if the State's proposed rule had been in effect.

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[112]Petitioner's Brief, 31.

[113]Even if the procedures and rights in California courts might meet constitutional standards, the rule which the State desires must necessarily apply to all states.

The State argues that there are procedural burdens on the federal courts in enforcing constitutional rights. It also impliedly argues that there are burdens on the state courts in granting those rights to accuseds. But any problems in the administration of constitutional rights should not eliminate the existence of those rights. The courts' administration of their calendars is at most a practical problem, capable of practical solution. Whenever this Court has defined an important constitutional right, both the state and federal courts have adopted the necessary administrative procedures. And such procedures as that used by this Court in *Jackson v. Denno*, referring evidentiary hearings to the state courts, help reduce whatever burden there might be on federal calendars.

The State makes a further argument which is frightening. It argues that consititutional rights at trial should give way to condemnation and then rehabilitation.[114] Carried to its logical conclusion, the State's argument would say there is no reason for constitutional rights; rather, lock up all accuseds and then rehabilitate them. That is hardly consistent with the Constitution. Rehabilitation is certainly a vital objective of criminal justice. But that worthwhile objective does not eliminate constitutional rights at trial. A person has the right to be fairly tried before he is condemned and rehabilitated.

We also note the overemphasis which the State's proposed rule would give to state *appellate* opinions. The State's rule would make "the face of a state appellate court opinion"[115] of controlling significance. But the protection of constitutional rights is not just what a state appeal court may say in its opinion. As this Court said in *Fay v. Noia:*

> "[There] is no less a denial of due process because the State Supreme Court believed that the trial was actually a fair one." (427)

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[114]Petitioner's Brief, 32.

[115]Petitioner's Brief, 28. See also footnote 101 in this brief.

And in *Townsend v. Sain:*

> "The whole history . . . refutes a construction of the federal courts' habeas corpus powers that would assimilate their task to that of courts of appellate review." (311)

Constitutional rights have their real significance in the *trial* court, where the jury determines guilt or innocence. Enforcement of those rights requires an examination of what occurred at trial. The state courts can not hide constitutional inadequacies behind a literary appellate opinion.

The State's Proposed Rule Is Contrary To the Intent of Congress

The State's proposed rule, restricting federal courts in examining the constitutionality of trial court convictions, is contrary to the intent of Congress. That congressional intent is expressed in numerous statutes; for example:

Chapter 153 of Title 28 (§§ 2241 and following) are the statutes defining the power of federal courts to grant habeas corpus. That chapter is a *grant* of power to the federal courts, indicating Congress's intent that federal courts should examine trial court proceedings. Section 2241 defines that power, its wide scope, and its purpose. In Section 2243 Congress gave federal courts broad discretion to "summarily hear and determine the facts, and dispose of the matter as law and justice require." In Sections 2245 through 2248 Congress specified evidence which federal courts could consider in such proceedings. And in Section 2251 Congress gave federal courts power to stay state court proceedings. The enforcement of rights provided in Chapter 153 expresses Congress's intent that federal courts have fact-finding supervision over the constitutionality of state court trials.

Subsection (d) of Section 2254, on which the State relies, is an expression of that same congressional intent. In that subsection Congress enumerated eight circumstances in which presumptions for the state courts would not apply. By enumerating those circumstances, Congress specifically

gave federal courts power to right those wrongs without any presumption for the benefit of the state. Representing, as it does, a codification of this Court's decision in *Townsend v. Sain*, subsection (d) is also an expression of Congress's approval of the decisions of this Court on federal court examination of state criminal proceedings.

The State's proposed rule is also contrary to the intent of Congress expressed in the Civil Rights Act; 42 U.S.C. § 1981 et seq.; 28 U.S.C. § 1343. In those sections, Congress granted federal courts jurisdiction over complaints of unconstitutional conduct in state proceedings.

It is therefore apparent that Congress intends the federal courts to supervise the constitutionality of state court convictions. The State's proposed rule is contrary to that intent. Indeed, with the specific statutes which Congress has passed defining the role of the federal courts in reviewing state convictions, it is questionable whether the Court *could* adopt the State's proposed rule.

Even If the State's Proposed Rule Were Adopted, It Would Not Result in Reversal of This Case

Even under the State's proposed rule, federal courts would still review state convictions if there were no "adequate corrective process" or if the prisoner's contentions were not "fairly considered."[116] The errors in the hearing on Atchley's involuntary confession are within those exceptions. As stated by the District Court:

> ". . . it is the conclusion of this Court that the trial court did not reliably determine whether Atchley's confession was voluntary or involuntary. The hearing on voluntariness was not 'fully adequate to insure a reliable and clear-cut judicial determination of the voluntariness of the confession' as required . . ."[117]

And:

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[116]Petitioner's Brief, 28.

[117]A. 76.

". . . the procedure used and the standards followed by the trial court did not satisfy the requirements . . ."[118]

We will not here repeat the reasons why the hearing on Atchley's involuntary confession was not an adequate corrective process and was not fairly considered. Those reasons have been discussed on pages 18 through 30 of this brief. For all of the reasons there stated, the District Court would still have the power to upset Atchley's conviction, even under the State's proposed rule.

There is a further reason why the District Court properly upset Atchley's conviction, even under the proposed rule. The State's rule would specifically provide that the state court's consideration must be "in the light of applicable constitutional law."[119] The District Court specifically found that the trial court "followed an erroneous standard of law in determining that the confession was voluntary."[120]

In that regard, the State attempts to support its position by arguing that this Court determined the fairness of Atchley's conviction when his petition for certiorari from his conviction was heard.[121] But the argument is incorrect. The dismissal of certiorari as improvidently granted does not constitute a decision on the merits; *Rogers v. Missouri Pacific Railroad*, 352 U.S. 500, 1 L. Ed. 2d 493, 77 S.Ct. 443 (1957) (concurring and dissenting opinion of Justice Harlan, and the dissenting opinion of Justice Frankfurter); see also, Leiman, "The Rule of Four," 57 Colorado Law Review 974 (1957), 105 U. Pa. Law Review, 1084 (1957). And in at least three involuntary confession cases, this Court upset confessions on certiorari coming through

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[118] A. 78.

[119] Petitioner's Brief, 28.

[120] A. 78, footnote 8.

[121] Petitioner's Brief, 3, 12.

the federal courts after having previously denied certiorari from the state convictions; *Leyra v. Denno, Jackson v. Denno,* and *Davis v. North Carolina.* The State's argument is also answered by the fact that subsequent to Atchley's petition from his state conviction, this Court held certain constitutional defects, including that of *Jackson v. Denno,* to be retroactive.

If a Further Hearing on the Involuntary Confession Is Necessary, the District Court Correctly Ordered the State To Provide That Hearing Under This Court's Procedures in Jackson v. Denno

As we have stated, we believe that the Court should hold that Atchley's confession was involuntary as a matter of law, and that Atchley should receive a new trial. If this Court nevertheless determines that a further hearing on the involuntariness of Atchley's confession is necessary, the procedure defined by the Court in *Jackson v. Denno* is correct.

The District Court directed the State to give Atchley a new hearing on the issue of voluntariness.[122] The State objects to this procedure.[123] The State agrees that the evidentiary hearing should be in the state court, but it contends that Atchley should be the petitioner.

Under such a procedure, Atchley would again be the applicant, pleading to the state court for relief. However, since this Court will at that point have already determined that the hearing on Atchley's confession was improper, the State and not Atchley should be the applicant to correct the impropriety. It was the State that initiated the process of prosecution. Since that process was constitutionally

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[122] A. 78.

[123] Petitioner's Brief, 38-9.

inadequate, it is the State's obligation to provide the means for correcting it.

The State's authorities[124] do not answer the point. They pertain to the *original* habeas corpus jurisdiction of the California courts. They do not limit the power of this Court to require corrective remedies when constitutional rights have been violated.

The State contends that there is no proceeding for the State to initiate the hearing.[125] But the answer is apparent: Reversing Atchley's conviction necessarily refers the case back to the state court to correct the defect in the trial proceedings; therefore, the hearing could be in the original action.

The State also argues that the burden of proof in the state hearing will be on Atchley. We disagree. As conceded by the State,[126] it has the burden of proof that the confession was voluntary. That burden does not shift to Atchley under § 2254(d), because Atchley's confession is within one of the exceptions to the presumption in that section. The burden of proof remains with the State.

This Court has granted the remedy of a state evidentiary hearing many times. It did so in *Jackson v. Denno* (391-6). It did the same in *Boles v. Stevenson* (45-46). And it did so in *Sigler v. Parker.*

That procedure has also received the implied approval of Congress. *Jackson v. Denno* was decided in 1964. Subsection (d), whose subject is federal court examination of state convictions, was added to § 2254 two years later, in 1966. In codifying this Court's decisions into subsection (d) after *Jackson v. Denno,* Congress impliedly agreed to the procedures provided by the Court in that case.

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[124]Petitioner's Brief, 39.

[125]Petitioner's Brief, 39.

[126]Petitioner's Brief, 23. A. 93.

We again note that referral to the state courts also aids the dockets of the federal courts, a subject on which the State comments frequently in its brief.

CONCLUSION

Atchley's conviction cannot stand. He is an illiterate man, with low natural intelligence and permanent brain damage. A confession was obtained from him involuntarily. He was denied an attorney several times, was never advised of his rights, and suffered from shock and lack of sleep. He was finally deceived by a friend who was the police's agent. The deceit offered Atchley a reward, insurance money. By that deceit and reward, his confession was secretly recorded.

That confession was vital to Atchley's conviction.

Because of the circumstances, particularly the repeated denial of an attorney, Atchley's confession was involuntary as a matter of law.

Further, the hearing on the confession was constitutionally inadequate. The trial judge did not rule on the confession. The hearing was conducted in the presence of the jury. And relevant evidence was excluded.

The State's arguments demonstrate no basis for reversal of the lower courts. Section 2254(d) was excepted and rebutted. And this Court should reject the State's attempt to destroy federal court examination of the constitutionality of trial court convictions.

Atchley asks the judgment of this Court as follows:

(1) The judgments of the District Court and Court of Appeals should be modified to hold that his confession was involuntary as a matter of law, and he should have a new trial; as so modified, those judgments should be affirmed.

(2) At the very least, the judgments of the courts below granting Atchley a new hearing on the involuntariness of his confession should be affirmed in their present form.

DATED: July 8, 1970, San Francisco, California.

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APPENDIX TO RESPONDENT'S BRIEF

§ 2254

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such fac-

tual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.